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1 P R O C E E D I N G S

2 (11:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next this morning in Case 09-6822, Pepper v.
5 United States.

6 Mr. Parrish.

7 ORAL ARGUMENT OF ALFREDO PARRISH

8 ON BEHALF OF THE PETITIONER

9 MR. PARRISH: Mr. Chief Justice, and may it
10 please the Court:

11 Having successfully completed drug treatment
12 in prison, and having come home to succeed as a college
13 student, valued employee, and family man, Jason Pepper
14 presents to this Court two questions: Whether
15 post-sentencing rehabilitation is a permissible basis
16 for a downward variance from the sentencing guidelines
17 at resentencing, and whether the district court judge in
18 Pepper's resentencing was bound by the law of the case
19 doctrine in its 5K departure ruling absent new facts,
20 changes in the controlling law, or to avoid a manifest
21 injustice.

22 Post-sentencing rehabilitation has
23 traditionally been a relevant factor for judges to
24 consider and is now a permissible ground for a
25 non-guideline sentence. 3553(a) and 3661 are the

1 authorities permitting post-sentencing rehabilitation as
2 a consideration for variance.

3 CHIEF JUSTICE ROBERTS: Counsel, I think
4 you -- I think you have got a difficult job navigating
5 between your two issues. It seems on the first one, the
6 40 percent to 20 percent, you are saying: Look, you've
7 got to stick with what you did before; and when it gets
8 to the post-sentencing consideration, you are saying:
9 Well, we can -- all bets are off, we can start -- start
10 anew; we can look at things that have happened since.

11 Is there a way you reconcile that --
12 those -- that tension?

13 MR. PARRISH: They are like apples and
14 oranges. The law of the case doctrine is what you refer
15 to as a matter that is left in the district court. The
16 other issue of the -- whether or not the individual
17 qualifies for downward variance is a completely separate
18 issue. The law of the case remains with the district
19 court judge.

20 In the other issue that we have, it's
21 whether or not he's entitled to a downward variance
22 based upon the book of remedies. So they are not, in
23 fact, the same issues. And there is no tension --

24 JUSTICE GINSBURG: If the law of the case --
25 if the law in the case is left to the district court,

1 then the district court can say, well, the law of the
2 case, that's what that other judge said, but it was a
3 question of what's a reasonable time, and I'm -- I
4 appraise it differently.

5 The -- the judgment has been vacated, the
6 sentence has been vacated, so how does the law of the
7 case survive? I mean, is -- the judgment is no
8 longer --

9 MR. PARRISH: The law of the case survives
10 on a couple of basic principles. One, there has to be
11 new facts that the district court judge heard; there has
12 to be a change of controlling law; and there has to be a
13 reason to avoid a manifest justice.

14 If you go back to the 5K, one departure that
15 the first judge made the decision on, that law -- that
16 was law of the case. That percentage followed
17 Mr. Pepper straight through the process. That's a
18 totally separate ruling from any of the other factors in
19 this case that relate to his downward variance.

20 JUSTICE GINSBURG: Can a district judge say,
21 later on in the process: I made a ruling earlier in the
22 case; I have since done a lot of research, and I now
23 think that that ruling was wrong?

24 MR. PARRISH: Absolutely, they could do
25 that. The circumstances would be, did they see new

1 facts? Was there a change of controlling law? The
2 reason we do this is because we want to have confidence
3 in that decision to make sure litigants don't go judge
4 shopping.

5 So that's part of the reason this law of the
6 case doctrine is in there. Even in Judge Posner's
7 Second Circuit decision we cite in our brief, you defer
8 to the first judge. But any time a judge can
9 reconsider, there is no problem with that.

10 The law of the case in the 5K departure,
11 when the first district judge heard substantial evidence
12 with regard to the issue of cooperation, and that's what
13 he did. When the next judge heard it, she heard no new
14 facts, no change in controlling law, and absolutely
15 heard no evidence with regard to --

16 JUSTICE SOTOMAYOR: Counsel --

17 CHIEF JUSTICE ROBERTS: That's kind of a
18 fortuitous situation, then. You are sort of saying if
19 you end up with the same judge, she can reconsider her
20 own prior determination. But if you, for whatever
21 reason, the death of the first judge, you're in a
22 different judge; she's bound by what went before. That
23 doesn't seem right.

24 MR. PARRISH: Well, that's an excellent
25 example -- bound by -- but have you had to look at the

1 law of the case and make a decision whether or not new
2 facts came in, there was a change in controlling law.
3 Otherwise, you are still stuck as law of the case with
4 that particular information. If new facts came in --

5 JUSTICE SCALIA: Even with the original
6 judge?

7 MR. PARRISH: Even with the original judge.
8 Absolutely, Justice Scalia.

9 JUSTICE SCALIA: Unless there are new facts
10 or some -- some new --

11 MR. PARRISH: New facts, a change in
12 controlling law, or other factors. It's a basic
13 concept, and that's why a lot of cases are not floating
14 around about that. Plus the government --

15 JUSTICE SOTOMAYOR: Counsel, I'm -- I'm a
16 little confused.

17 MR. PARRISH: Sure.

18 JUSTICE SOTOMAYOR: I thought that the
19 entire premise of Booker was that judges should have
20 full discretion under 3553 to balance the factors that
21 are required by the statute to be balanced and to come
22 to what they believe is the appropriate sentence.

23 If we impose, in a resentencing, in a remand
24 order that has vacated a prior sentence, a limitation on
25 that power, don't we in turn do exactly what you are

1 arguing in your first half of your appeal, which is
2 unconstitutionally tie the hands of the judge? I think
3 that is what Justice -- the Chief Justice was getting to
4 in his first question.

5 MR. PARRISH: Absolutely. That's why they
6 are apples and oranges. If you go to the Booker
7 decision with regard to Mr. Pepper -- and Mr. Pepper's
8 decision is under the remedial remedy that we are asking
9 that you would impose in that case -- Mr. Pepper's case
10 is still on direct appeal.

11 As a matter of fact, if the restrictions
12 placed upon 3742 (g)(2), if they remain, Mr. Booker
13 would not have gotten the advantage of the remedial
14 ruling in the case. Actually, he was entitled to it as
15 part of the Sixth Amendment.

16 JUSTICE SOTOMAYOR: So why isn't a new
17 sentence just that: A new sentence? And the judge,
18 whoever the judge is, can do what they are supposed to
19 do, which is to look at all of the factors and weigh
20 them as that judge believes is appropriate, assuming the
21 remand order is not a limited order.

22 MR. PARRISH: They can look at all of the
23 facts, if there are new facts presented. The difference
24 is, in the law of the case, there were no new facts. In
25 this case, there were new facts to consider, which would

1 be part of the post-sentencing rehabilitation. In that
2 issue, the Eighth Circuit rule that prohibited this was
3 not even part of the 3742(g)(2) statute.

4 JUSTICE SCALIA: Yes, but one -- one of the
5 new facts that -- that is before a judge on remand is
6 that part of the basis for his decision has been
7 eliminated. He -- he gave additional time because of a
8 certain factor, and the court of appeals says: Oh, no,
9 you can't look at that factor. And then he looks at the
10 whole thing and says: Gee, without that factor this guy
11 is getting off scot-free.

12 You mean he cannot -- he cannot readjust his
13 other discretionary judgments in light of the fact that
14 this additional factor doesn't exist? That seems
15 rather -- I don't -- counterintuitive, I guess.

16 MR. PARRISH: Well -- well, Justice Scalia,
17 under the -- each that is presented to the court, if you
18 mix the law of the case doctrine with the 3742 problem,
19 it creates a problem in analysis. That's why they have
20 to be analyzed separately.

21 A judge can look at new facts, even under
22 the remand statute, now that they are restricted to the
23 facts that were part of the first case. That's what
24 3742(g)(2) does. It makes the guidelines sentences
25 mandatory on remand. That's the problem with it.

1 If they become mandatory on remand, the
2 problem is that nobody gets the advantage of the Booker
3 remedial ruling of it directly, and all sentences on
4 remand are mandatory. Even in the Booker decision, you
5 make it -- in which Mr. Pepper was a recipient of,
6 because his case was going on at the time -- he did not
7 ever get the benefit of the Booker decision; when it was
8 sent back, he never did. Mr. Booker, under 3742(g)(2),
9 never would have gotten that advantage.

10 And there were several other factors that
11 were coming into play where people would not get an
12 advantage of the Booker ruling.

13 JUSTICE GINSBURG: What do you do with
14 3742(g)(2)?

15 MR. PARRISH: You excise it. You discussed
16 it in the Booker decision. And in the Booker decision,
17 you indicated, Justice Ginsburg, that you exercised two
18 of the other -- 3553(b), you also exercise -- excised
19 3742(e), which made the sentences on remand mandatory.

20 In this case, 3742(g)(2)(A) and (B) were
21 left open. And what happens then, the district court
22 judge has to come back. Once they look at the decision,
23 they are bound within those original facts. They can't
24 go outside of those facts to decide something different
25 or to permit a variance.

1 The Eighth Circuit didn't use that rule.
2 What we are suggesting is that you excise that rule.
3 You excise 3742(g)(2) and you excise (A) and (B) of that
4 section.

5 JUSTICE ALITO: Would it be consistent with
6 Booker for Congress to pass a statute that says the
7 following: When a judge initially imposes a sentence,
8 the judge must specify all of the factors that the judge
9 thinks are relevant to that sentence, whether it's going
10 to be a sentence within the guidelines or a sentence
11 that is outside of the guidelines, and if there is then
12 a remand, the judge may impose a sentence based on the
13 factors that were listed at the initial sentencing but
14 not based on any of the other factors?

15 MR. PARRISH: Justice Alito, Congress could
16 do that. Unfortunately, that's not what they did in
17 this case. But 3742, which came down as part of the
18 PROTECT Act, in that case, Booker came after that. So
19 consequently, 3742(g)(2) is problematic.

20 JUSTICE ALITO: Isn't that exactly what
21 3742(g)(2) does?

22 MR. PARRISH: It does not.

23 JUSTICE ALITO: It says under 3553(c), the
24 sentencing judge is supposed to explain the factors that
25 justify the sentence that is imposed. And that would --

1 that means explain a sentence outside of the guidelines,
2 and also explain why the judge chooses a particular
3 sentence within the guidelines range.

4 We have -- 3742(g)(2) says that when there
5 is a remand, the judge may take into account all the
6 factors that were mentioned the first time, but not the
7 other factors.

8 MR. PARRISH: Well, Justice Alito, let me
9 give you an example. What if they didn't state the
10 reasons and you go up on the variance from the district
11 court decision saying you didn't get the stated reasons?
12 The appellate court then sends that decision back and
13 the judge is then bound by those facts. And if they
14 didn't find all the facts, suppose again they went up on
15 a presumption that the guidelines were, in fact,
16 reasonable. In that instance, you wouldn't get anything
17 for the judge to work from.

18 And absolutely, they work from facts now
19 within the guidelines. You take the Stapleton case that
20 is in the Eighth Circuit that's cited in our brief.
21 They will increase the guidelines within the guidelines
22 on new facts, but you can't take those same new facts
23 and then use them to assist your clients under 3553,
24 which goes against all of the things --

25 JUSTICE GINSBURG: Is the sentencing -- is

1 the sentencing commission -- it still has that guideline
2 that you can -- you can depart -- you can lower within
3 the guidelines, but not beyond it?

4 MR. PARRISH: Correct. You mean under the
5 post-sentencing rehabilitation?

6 JUSTICE GINSBURG: Yes.

7 MR. PARRISH: They have it as a policy bar,
8 but the Kimbrough decision really indicates that the
9 courts are not supposed to use that as only one factor.
10 You are supposed to look at all the rest of the factors.
11 And as a matter of fact --

12 JUSTICE GINSBURG: But as far as the
13 sentencing commission itself is concerned, its position
14 is still that post-conviction behavior does not warrant
15 a below-the-guideline sentence?

16 MR. PARRISH: Correct. And it comes right
17 out of the Eighth Circuit, which was not based upon
18 empirical data like a lot of these other issues are
19 based on that they create as policy matters. But under
20 Kimbrough, you said policy matters are only one
21 consideration. You must, in fact, look at all the other
22 factors.

23 You also said it in Reeder, too. You are
24 not bound by just one of the factors. The court has to
25 look at everything in order to be able to make a

1 decision to be consistent with all the other decisions
2 that you have written in this area.

3 JUSTICE ALITO: Suppose that Mr. Pepper had
4 an identical twin, and suppose that Mr. Pepper and his
5 twin engaged in the same criminal conduct. They are
6 charged with the same offenses; they are tried together;
7 they are convicted of exactly the same offenses; they
8 are sentenced on the same day.

9 Between sentencing and the time of the
10 appeal, they rehabilitate themselves in exactly the same
11 way. The twin sentence is affirmed on appeal, and
12 Pepper's sentence is overturned and he gets a remand for
13 a new sentence.

14 Why is it justified for Mr. Pepper to get
15 credit for post-sentencing rehabilitation, but his twin
16 does not?

17 MR. PARRISH: Well, in that instance, the
18 question is: Do guidelines accept the fact of some
19 disparity? And there is what's called warranted
20 disparity. Mr. Pepper did exactly everything that we
21 want a person convicted of a crime to do. He exceeded
22 it. And in that instance, if his case comes back down,
23 it doesn't fall on any concept of unwarranted disparity.
24 There is a difference. There is a difference with every
25 individual --

1 JUSTICE ALITO: His twin did everything that
2 was expected of him, too, but he doesn't get any credit
3 for the rehabilitation. He just gets good time credit
4 for good conduct while he's incarcerated.

5 MR. PARRISH: But our guidelines in our laws
6 make situations where people who are unique and who, in
7 fact, exceed, don't fall into a separate category of
8 being unwarranted disparity.

9 The emphasis is on "unwarranted." There is
10 some disparity, and if a person is unique and that
11 person does, in fact, under 3353 factors, meet all of
12 the things that require us to look at a person as an
13 individual, that's what we want in our society. And
14 that's what your cases -- 3553, 3661 -- that's what they
15 indicate. You look at the person as an individual.

16 And true enough, some disparity will be
17 there, but it's a warranted disparity. And it's
18 something that the court can look at, along with all
19 the --

20 CHIEF JUSTICE ROBERTS: Well, it's -- it's
21 warranted that the one get the benefit and it's
22 unwarranted that the other does not. I mean, the
23 departure in the case of the one who gets
24 reconsideration is warranted, but that doesn't mean that
25 the disparity is warranted.

1 MR. PARRISH: Well, it would be on a
2 variance and, as you know, under the Gall decision,
3 Chief Justice Roberts, you can look at all of the other
4 factors. In the departure theory, it's a little
5 different. They are little bit narrower, given it's
6 more restrictive, and there are other factors that come
7 into play.

8 Under the variance theory, you have to look
9 at the entire individual. So if that individual can
10 demonstrate that they have made improvements -- not just
11 gone to drug classes, but completed them successfully;
12 not just worked as an employee, but also excelled and
13 got on a management track; not just went to college, but
14 got on the dean's list and made straight A's -- those
15 are the factors that we want these individuals to have.

16 And that's why 3553(a) allows us that
17 latitude, and 3661, which is a long history based upon
18 no limitation being placed upon the district court
19 judge, these are the things we want these people to
20 have --

21 JUSTICE BREYER: Is there a guideline that
22 says that there cannot be a departure for rehabilitation
23 after an initial sentencing that is set aside?

24 MR. PARRISH: It's not a guideline. There's
25 a policy out of the --

1 JUSTICE BREYER: No. So there is no
2 guideline. So as far as the answer to Justice
3 Ginsburg -- what I thought her question was, that is --
4 the guidelines initially said that the commission has
5 the power to limit departures, but it doesn't do it,
6 except for race and gender --

7 MR. PARRISH: And age, and factors like --
8 that's absolutely right.

9 JUSTICE BREYER: -- and age. That's right.
10 So under the guidelines, a judge can depart for any
11 reason except those few forbidden things, which I think
12 are properly --

13 MR. PARRISH: And that's the grammar,
14 variance. That's correct.

15 JUSTICE BREYER: And that's still the law.
16 That's still the law.

17 MR. PARRISH: Correct. That's correct.

18 JUSTICE BREYER: So it's the circuits that
19 have made this thing up?

20 MR. PARRISH: The Eighth Circuit created it
21 out of whole cloth following the Sims case. It was a
22 policy that was actually adopted by the guidelines in
23 the year 2000. Prior to that, there were about 8
24 circuits that allowed post-sentencing rehabilitation.
25 Now even under the new analysis, there are about 6

1 circuits --

2 JUSTICE BREYER: Well, what would the source
3 of law be to make up such a thing? I mean, what is the
4 source -- what law gives the right to the -- to a -- a
5 circuit, to make that up, would have to say it was an
6 unreasonable thing to do.

7 Now, I guess you could have an argument
8 either way on that, but it doesn't strike me off the bat
9 as unreasonable, where a person has rehabilitated
10 himself, to take that into account.

11 MR. PARRISH: I would agree with you.

12 JUSTICE BREYER: And we would have the power
13 to say that.

14 MR. PARRISH: Absolutely.

15 JUSTICE SCALIA: What about 3742(g)(2)?
16 That's what we're arguing about.

17 MR. PARRISH: It is what we are arguing
18 about, not about the policy, because they didn't even
19 use that, Justice Scalia, in making their decision.

20 I would like to reserve my time.

21 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

22 MR. PARRISH: Thank you so much.

23 CHIEF JUSTICE ROBERTS: Mr. McLeese.

24 ORAL ARGUMENT BY ROY W. McLEESE, III,
25 ON BEHALF OF THE RESPONDENT, IN SUPPORT OF THE

1 PETITIONER

2 MR. McLEESE: Mr. Chief Justice, and may it
3 please the Court:

4 There is no valid basis to categorically bar
5 variances under the -- variances from the guidelines
6 based on post-sentencing rehabilitation. That is true
7 for four primary reasons.

8 First, it's undisputed that post-sentencing
9 rehabilitation is logically irrelevant to statutory
10 sentencing factors in 3553(a), including the need for
11 deterrents and the need to protect the safety of the
12 community.

13 Second, the guidelines themselves authorize
14 consideration of presentencing rehabilitation to a
15 limited extent, because it's permissible under the
16 guidelines to consider presentencing rehabilitation in
17 selecting a sentence with inside the guideline range.

18 What the guidelines do prohibit, and there
19 is a provision in the guidelines that does prohibit
20 the -- a departure from the guidelines based on
21 post-sentencing rehabilitation. The guidelines prohibit
22 that, but the judgment of the commission about how much
23 weight that factor can be given after Booker in an
24 advisory guideline regime is advisory rather than
25 mandatory.

1 Third --

2 JUSTICE BREYER: Which guideline? What
3 guideline prohibits that?

4 MR. McLEESE: 5K2.19.

5 And third, contrary to the suggestion of the
6 amicus, there is no general principle in our law that at
7 a resentencing, new information may not be considered.
8 To the contrary, the consistent assumption of the law is
9 that at a resentencing, you take the defendant as you
10 find him as of the time of resentencing. That is clear
11 from this Court's decisions in Pierce and in Wasman. It
12 is clear from the large body of cases from the lower
13 courts cited in Petitioner's brief at pages 42 through
14 44.

15 That's the way the guidelines operate, so
16 there is no general principle that you cannot consider
17 new information.

18 Now, it's true, as Justice Alito's question
19 suggested earlier, that that can result in differences
20 of opportunity, where one defendant will have an
21 opportunity for a resentence and new information will be
22 considered as to that defendant; a similarly situated
23 defendant will not get a resentencing.

24 But that opportunity is sometimes referred
25 to as "luck." First, can be good luck or bad luck, and

1 to take the example Justice Alito gave of two twins, if
2 you have an example of two defendants who are twins who
3 are each convicted of an offense -- let's say
4 burglary -- and they are given very lenient sentences,
5 and because the judge looks at their record at the time
6 and determines that they are sympathetic. They are
7 don't have a prior criminal record.

8 One of them's conviction, you know, has no
9 claims of legal error relative to his conviction; he
10 gets no resentencing. The other gets a resentencing.
11 By the time of resentencing, it has become clear that
12 that defendant had previously committed several murders,
13 and he's -- you know, murdered -- has also committed a
14 subsequent murder.

15 There is no question that at that
16 resentencing, that information would be considered.
17 There is no question there would be a disparity, and it
18 would be true even if, let's say, those earlier murders
19 had been committed by both of the twins together.

20 JUSTICE ALITO: Well, isn't there a
21 difference between evidence that -- evidence of conduct
22 that occurred prior to the initial sentencing, but
23 wasn't known at the time of the initial sentencing, and
24 evidence of conduct that occurs between the initial
25 sentencing and the resentencing?

1 MR. McLEESE: There could be, but again --
2 maybe going too far with the example of the two twins,
3 if the two twins, while they were serving -- let's say
4 they got lenient sentences, but not probation. While
5 they were serving in jail together, they murdered a
6 correctional officer. If one of the defendants does not
7 get a resentencing, if one of those twins does not,
8 there will be no opportunity for that to be taken into
9 account.

10 JUSTICE SCALIA: And what's your --

11 MR. McLEESE: His brother gets a
12 resentencing --

13 JUSTICE ALITO: Maybe it's all or nothing.

14 JUSTICE SCALIA: It is.

15 JUSTICE ALITO: Maybe it works both ways,
16 that the defendant doesn't get the credit for good
17 conduct between sentencing and resentencing, but also
18 doesn't get punished at resentencing for unproven
19 conduct that occurs between the first sentence and the
20 next -- and the second sentence.

21 MR. McLEESE: That's a possible rule of law,
22 but my point was that's not the rule of law we've ever
23 had. That's not the -- and I should say, nor is it the
24 rule of law that is created by 3742(g)(2), because
25 3742(g)(2) is not a rule about consideration of new

1 evidence. It's an anti-departure provision. It permits
2 consideration of new evidence, and it permits these
3 kinds of -- if you -- disparities, whether warranted or
4 not, because it permits consideration of new evidence in
5 determining the guidelines' range, new evidence about
6 loss amounts or -- or whatever. It permits
7 consideration of new evidence as it might relate to
8 upward adjustments or downward adjustments, as it might
9 relate to criminal history. What it forbids is new
10 variances or departures.

11 So 37422(g)(2) does not implement some
12 general policy with respect to new evidence, nor, should
13 I say, to the guidelines, because as I said, the
14 guidelines permit consideration of post-sentence
15 rehabilitation in setting a guideline range. They
16 reflect a judgment not about the disparities always
17 trumping other considerations, including accuracy in
18 sentencing, but only how much weight that those
19 disparities --

20 JUSTICE SCALIA: Is that your fourth point?
21 I am all on pins and needles waiting for your fourth
22 point.

23 MR. McLEESE: No. Apologies. The fourth
24 point is simply that 3742(g)(2), if valid, would
25 foreclose consideration of post-sentencing

1 rehabilitation, but after Booker it is not valid, and --

2 JUSTICE KENNEDY: If Congress reenacted
3 3742(g)(2) tomorrow, would it be valid?

4 MR. McLEESE: It would be invalid. It would
5 be invalid because it would be -- as applied in certain
6 circumstances, it would unconstitutionally constrain the
7 authority of judges at resentencings and also be -- with
8 Booker.

9 JUSTICE BREYER: Why? Why? Because look,
10 the -- that is not this case. This case, they never had
11 a chance to consider whether Booker applies or not, so
12 this is, I think, a special case.

13 But think of 3742(g) in general. It's
14 pretty easy to read that section as applied to instances
15 where a judge, the initial sentencing judge, has decided
16 on his own volition to apply the guidelines rather than
17 not to apply them.

18 Now, in such a case, he sentences the
19 individual. There's then an appeal, and the appeal he
20 is reversed on. What in the Constitution says there has
21 to be a second chance to decide whether the guidelines
22 or something else should apply? What in Apprendi says
23 that? What in any of these cases says that?

24 This is an Apprendi problem. As you know,
25 I've dissented throughout; I think this is bad policy,

1 but -- I've disagreed with everything, but forget that
2 fact, important though it is.

3 (Laughter.)

4 JUSTICE BREYER: But the -- the thing that's
5 worrying me about -- and I don't think -- I agree with
6 you on policy, but what I'm -- what I'm having trouble
7 with is: Is it better under the law to say yes, we can
8 interpret 3742(g) so it can be constitutional, and then
9 if in some cases it violates Apprendi, let the Court say
10 that in this case it violates Apprendi.

11 But it just isn't clear to me, which is why
12 I left it alone the first time. It's not clear. So --
13 so as to when it is, when it isn't constitutional.

14 You got my whole question there?

15 MR. McLEESE: I do.

16 JUSTICE BREYER: And I would appreciate as
17 much answer as can give me.

18 MR. McLEESE: Take an example that is in the
19 briefs. If at an original sentencing a judge determines
20 the guideline range and ends up calculating it to be
21 relatively low -- 57 to 73 months, which probably aren't
22 even exact numbers -- and determines that that's an
23 appropriate sentence, and although the defendant is
24 urging various factors as a basis for downward -- for
25 variance from the guidelines, the judge determines that

1 there is no reason to vary because this is a sentence
2 that seems reasonable.

3 So although those reasons might well be
4 persuasive in some contexts, they aren't given the range
5 now. The government takes an appeal and argues to the
6 court of appeals: In fact, the judge was wrong; the
7 guideline range is much higher. And so on remand at the
8 resentencing, the judge makes some factual
9 determinations, not found by the jury or admitted by the
10 defendant, which increase the guideline range under the
11 new advice from the court of appeals to a guideline
12 range of 121 to 151 months.

13 JUSTICE BREYER: You think that violates
14 Apprendi?

15 MR. MCLEESE: Well, if the judge then says:
16 I would like to vary from the guidelines; I am locked
17 under the guidelines to a 121-month sentence, and I
18 have -- I didn't -- it's true I didn't vary before on
19 these grounds, but that's because the sentence didn't
20 author -- didn't warrant -- because of relative lack of
21 severity, did not warrant a variance, I think that
22 the -- the logic of Apprendi and Booker would foreclose
23 constraining resentencings in that way.

24 JUSTICE ALITO: I'm --

25 MR. MCLEESE: And I think that's an answer.

1 If I could just --

2 JUSTICE ALITO: Yes.

3 MR. MCLEESE: I think that's an answer to
4 the question that you asked earlier, which is, I think,
5 if Congress enacted a statute which categorically said
6 that whatever happens at the original sentencing, the
7 judge has to list any reason that the judge is relying
8 for a downward variance or departure, and then cabins
9 the judge on a remand, that in certain contexts that
10 would be inconsistent with this Court's line of cases
11 from Apprendi through Booker.

12 JUSTICE ALITO: Well, under 3553(c), the
13 court is supposed to explain the reasons for the
14 sentence, even if it is within the guidelines; isn't
15 that right?

16 MR. MCLEESE: Yes.

17 JUSTICE ALITO: And so if the court is
18 deciding whether the sentence should be 57 months or
19 63 months, whatever the figures were that you gave. The
20 court thinks that some factor -- let's say age is
21 significant -- the court should say, I am sentencing the
22 defendant to 57 as opposed to 63 because of the
23 defendant's advanced age or young age or whatever it is.

24 Now on appeal, the -- the court of appeals
25 says the guidelines sentence was improperly calculated,

1 it should be -- the real range is 120 to 125 months,
2 remand. Now if the court wants to grant a departure or
3 a variance based on age, the court has mentioned age
4 previously as a relevant factor, and it can do that.
5 But if age was not -- if age was not relevant to the
6 determination of where within the guidelines this
7 sentence should be set, why is it -- why does the
8 Constitution require that age be a relevant factor, a
9 factor that's open to the judge on resentencing?

10 MR. McLEESE: Well --

11 JUSTICE ALITO: It's just the notice
12 provision. It's not -- it's not something that
13 substantively limits what the court can do.

14 MR. McLEESE: To clarify, a judge is
15 required to state in open court orally the reasons for a
16 sentence inside the guideline range, only if the range
17 is sufficiently large, and the written statement of
18 reasons does not require -- the reasons for selecting a
19 sentence within the guideline range are not required to
20 be in the written statements of reasons. The written
21 statement of reasons applies only to grounds outside the
22 -- the guidelines. And to -- from a practical
23 perspective it would be extremely difficult to expect
24 sentencing judges to list every conditionally or
25 contingently relevant fact depending on whatever

1 sentence ultimately comes back on remand, that might be
2 relevant to a reason to depart from a range that the
3 judge is not contemplating at the time of the
4 sentencing.

5 Ut I should say also that if --the answer to
6 this question of better Congress could reenact
7 3742(g)(2) after Booker, and it would be constitutional
8 or not constitutional as applied in certain settings is
9 not essential to our point, because the appeal
10 provisions that were excised in Booker were not
11 determined by the Court, they were not excised because
12 the Court determined they would be independently
13 constitutional.

14 The remedial component of the Booker opinion
15 was focused on the question of, having found a
16 constitutional violation, what then do we do to remedy
17 it, and what the Court said was the way we will remedy
18 this is that we will make the guidelines advisory rather
19 than mandatory.

20 JUSTICE BREYER: The answer to this case is,
21 I don't think, too hard. You say it's at least
22 questionable enough, 42(g) you could say, at least
23 questionable enough that it is the same box as the ones
24 that were excised.

25 MR .McLEESE: And --

1 JUSTICE BREYER: And then there has not been
2 focus in the district court on what the district court
3 would want to do, assuming he is free to apply the
4 guidelines or not, on the remand decision that that
5 judge has never made.

6 MR. McLEESE: Yes, and to elaborate on
7 that --

8 JUSTICE BREYER: Is that right?

9 MR. McLEESE: Just -- just by its terms,
10 section 3742(g)(2) is inconsistent with the remedial
11 rule announced in Booker, which was that the guidelines
12 would be advisory rather than --

13 JUSTICE BREYER: They didn't say -- forget
14 that argument. What I was about --

15 MR. McLEESE: But more specifically --

16 JUSTICE BREYER: I do have another point I
17 would like to get out, as long as I have this
18 opportunity. It seems to me there is a considerable
19 confusion, perhaps, only from my point of view, but this
20 word "variance" -- I mean why is it felt necessary to
21 use the word "variance"? If it is true, and it's not
22 totally true, but if it's true the judge -- you can
23 apply the guideline, apply it. Now, the guidelines
24 themselves gives you the right to depart in every single
25 case but, for example, a handful of factors such as

1 race, where you really shouldn't change the thing just
2 because of race. So what is the need for the variance?

3 Now, maybe this 5K9. whatever that is, maybe
4 there are a handful in which there is a need, and maybe
5 this is an example of it. But are there a lot, many,
6 what -- can you just talk a little bit about it.

7 MR. McLEESE: It's two points with respect
8 to that. One of which is, this is a provision where
9 the -- the commission has specifically said it is not
10 lawful to depart on this basis, though it is
11 permissible, again, to sentence within the range --

12 JUSTICE BREYER: But it's just a policy
13 statement. Does it enjoy the same status of law?

14 MR. McLEESE: Correct. Yes, they are
15 treated -- in the era when the guidelines were treated
16 as mandatory, they were treated as guidelines in return.
17 There are other guidelines provisions about departures
18 which either foreclose other bases or which will say
19 they were not usually or ordinarily a basis for
20 departure.

21 JUSTICE BREYER: Oh, I see.

22 MR. McLEESE: And, so, there still is
23 litigation in a post mandatory guideline system about
24 whether it is a correct application of the guidelines to
25 on this basis.

1 CHIEF JUSTICE ROBERTS: Counsel, perhaps
2 before your time is up, you would like to address the
3 first question?

4 MR. McLEESE: Yes. With respect to the law
5 of the case issue, as it has been framed by the --
6 the -- the briefs by Petitioner on the merits in this
7 Court, it is an extremely narrow issue; and that is,
8 taking as a given that the Eighth Circuit had authority
9 to order de novo resentencing and, in fact, it did order
10 de novo resentencing was at that resentencing, the
11 district court -- the resentencing district court judge
12 bound by the earlier judge's discretionary determination
13 that the substantial assistance provided by defendant
14 Pepper justified a 40 percent reduction. And to ask
15 that question is to answer it in the sense that the
16 phrase "de novo" means anew or afresh. And the point --

17 CHIEF JUSTICE ROBERTS: But it has
18 nothing -- but what if the appeal had nothing to do with
19 the issue at all? I'm thinking in -- the analogy in a
20 civil context, so you have two totally unrelated issues.
21 If you appeal issue B and that is what the fight is
22 about, and you reverse and send back, it would at least
23 be unusual for judge to say, well, and by the way, I'm
24 coming out the other way on issue A.

25 MR. McLEESE: And that is true in the civil

1 setting. Courts have taken the view that sentencing is
2 different because sentencing is a relatively discreet
3 proceeding where there are a number of interconnected
4 determinations, a lot of them discretionary, based on
5 the judge's assessment, a lot of them conditionally
6 relevant to each other --

7 CHIEF JUSTICE ROBERTS: These are not
8 interconnected, are they?

9 MR. McLEESE: Well, the amount of
10 substantial assistance that is given in a particular
11 case can easily be connected to antecedent
12 determinations, including what the guidelines level is.
13 Since judges often --

14 CHIEF JUSTICE ROBERTS: No, my point is that
15 the level of assistance is not in any way connected to
16 the post-sentencing conduct.

17 MR. McLEESE: These two issues are not
18 interrelated, but I'm explaining the reason for of the
19 doctrine in the sentencing setting. The greater
20 willingness of courts of appeals to order de novo
21 resentencing and say even though the particular issue on
22 court of appeal does not directly open up the other
23 issues that may have been determined at sentencing,
24 judges in the -- courts of appeals in the sentencing
25 context all agree they have authority to order de novo

1 resentencing where they think it's appropriate. And
2 they tend to think it is more appropriate in the
3 sentencing context than generally, because as I said --

4 CHIEF JUSTICE ROBERTS: Well, but why -- why
5 does that matter when you are talking about two totally
6 unrelated issues?

7 MR. McLEESE: Because also --

8 CHIEF JUSTICE ROBERTS: There is no reason
9 to suppose that the court of appeals thinks there ought
10 to be or any issue with respect to the question A when
11 they focus solely on question B.

12 MR. McLEESE: I agree. But again, when the
13 court of appeals orders de novo resentencing, that
14 doesn't open up only substantial assistance. The point
15 is, the judge is going to go through and as of the time
16 of the resentencing, determinations on the situation as
17 it existed at that time. So, it is possible and not at
18 all unusual that issues that were not up in the court of
19 appeals will come up on resentencing.

20 CHIEF JUSTICE ROBERTS: So, you are worried
21 about the general rule, but you agree that none of these
22 arguments make any sense in this case?

23 MR. McLEESE: I -- I agree that it would
24 have been permissible for the court of appeals here to
25 choose not direct a de novo resentencing that would have

1 been a permissible way to resolve the issue as well --

2 CHIEF JUSTICE ROBERTS: That would not
3 interfere with the new judges or the judge's discretion
4 across the board?

5 MR. McLEESE: I -- I --

6 CHIEF JUSTICE ROBERTS: I have never had to
7 sentence someone, but it seems to me, particularly when
8 you have a change in the judges, there is a very
9 personal investment in what you do with the -- the
10 defendant, and to say that, well, another judge looked
11 at this factor, so your hands are tied in that respect
12 is -- is a questionable result.

13 MR. McLEESE: I agree. And I should say
14 that the issues that we are discussing are interesting
15 ones, but they are not the law of the case issue that is
16 being presented here. Because, in fact, the Eighth
17 Circuit did order de novo resentencing, the defendant
18 has never challenged the validity of their ordering
19 de novo resentencing, so the only issue is what does it
20 mean for the law of the case doctrine when de novo
21 resentencing is ordered?

22 And on that question, it is very clear. In
23 fact, not just the Eighth Circuit but every court of
24 appeals that we are aware of to resolve that question
25 has said that as the name suggests when the circuit

1 chooses, for whatever reasons, to order de novo
2 resentencing, the -- the judge at resentencing is not
3 bound by earlier determinations of the district court
4 judge. And --

5 CHIEF JUSTICE ROBERTS: Is there reason to
6 suppose when they say de novo resentencing, they are
7 talking about the mistake that was made with respect to
8 the issue B and not issue A?

9 MR. McLEESE: No, there is no reason to
10 suppose that. But what there is reason to suppose --

11 CHIEF JUSTICE ROBERTS: Do they -- is it
12 their practice in some cases to say we are sending this
13 back for de novo sentencing, but only with respect to
14 the issue that we addressed, or do they just normally
15 throw it out and say start over, without any supposition
16 that the district court would take a look again at
17 something that wasn't before the court of appeals at
18 all?

19 MR. McLEESE: Different circuits approach
20 that somewhat differently, but all circuits have --
21 understand that they have authority to make
22 individualized case determinations and they do. There
23 are cases where --

24 CHIEF JUSTICE ROBERTS: Could they -- are
25 you aware of any case where the Eighth Circuit has said,

1 we are sending this back for resentencing but only on
2 the issue that we addressed on appeal?

3 MR. McLEESE: Yes. And the Eighth Circuit's
4 opinions make clear that although they apply sort of a
5 default presumption that there will be de novo
6 resentencing, they make clear that they have authority
7 to order limited resentencings. And they do that where
8 in a particular case they think it is more efficient or
9 more appropriate.

10 They explained in this case, by the way,
11 with the with respect to the suggestion you made
12 earlier, Mr. Chief Justice, that part of the reason they
13 thought de novo resentencing was appropriate here is
14 because they were reassigning the matter to a different
15 judge, and therefore, I think for some of the reasons
16 that you were suggesting, they felt de novo review was
17 appropriate.

18 But again, on the narrow law of the case
19 issue that is presented, there is no disagreement among
20 the courts of appeals, and as the name suggests, if
21 there is a de novo resentencing, the matter is de novo.

22 If I could for just a moment turn back to
23 the post-sentence rehabilitation issue to make one last
24 point, which is going one level deeper into the Booker
25 remedy analysis again, even if there were some -- excuse

1 me.

2 CHIEF JUSTICE ROBERTS: Finish your
3 sentence.

4 MR. McLEESE: All I was going to say was in
5 excising the appeal provisions that were excised in
6 Booker, the Court identified four reasons why those
7 should be excised, and each one of them applies equally
8 or more so with respect to the provision at issue here.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.
10 Mr. Ciongoli?

11 ORAL ARGUMENT OF ADAM G. CIONGOLI,
12 AS AMICUS CURIAE, SUPPORTING JUDGMENT BELOW

13 MR. CIONGOLI: Mr. Chief Justice, and may it
14 please the Court:

15 Congress enacted 3742(g) for the purpose of
16 stopping district courts from evading the mandate of the
17 court of appeals on remanding sentencing cases by
18 relying on grounds that they did not consider at the
19 original sentence.

20 JUSTICE SOTOMAYOR: And as far as you are
21 concerned, Justice Alito's question about post --
22 post-sentencing criminal conduct couldn't be considered
23 by a court, either? Because it wasn't a factor
24 mentioned in the original sentence, so you would apply
25 the rule equally?

1 MR. CIONGOLI: I -- I would, Justice
2 Sotomayor.

3 JUSTICE SOTOMAYOR: Is there any logic to
4 that? I mean, I know that when I was a district court
5 judge, routinely post sentencing criminal conduct would
6 make me wonder whether this person really was worthy of
7 a lower sentence or not, or of whatever largesse I may
8 have given him or her in original sentence. What makes
9 sense about that?

10 MR. CIONGOLI: Well, I think one thing that
11 would make sense of it is there's a different mechanism.
12 There is an opportunity for that to be reflected in a --
13 in a separate criminal prosecution and a -- and a
14 sentencing for that conduct. When -- when the
15 sentencing guidelines were created and when 3742(g) was
16 passed, all of this was done against the backdrop of a
17 sense that the sentencing guidelines were to focus on
18 avoiding unwarranted disparities, but as the Court
19 observed in Booker, sentencing similar -- similar
20 sentences for similar crimes conducted in similar ways.

21 JUSTICE SOTOMAYOR: When this provision was
22 passed, Congress was worried, I thought, about the
23 situations where district court judges has -- were on
24 appeal till -- you can't use this ground for departure,
25 and often the court, because they thought the original

1 sentence they gave was fair, would then articulate
2 another ground for departure that they hadn't earlier.
3 But wouldn't that all go out the window with Booker? I
4 mean, the presumption that drove Congress was that the
5 guidelines were mandatory. Once Booker said they
6 weren't, why should we be limiting Congress -- a judge's
7 discretion at an issue or post hoc to giving what they
8 believe is a reasonable sentence?

9 MR. CIONGOLI: Justice Sotomayor, I think
10 the purpose of 3742(g) is to limit the ability of the
11 district court to evade the mandate on remand in
12 sentencing. And I think that purpose was valid before
13 Booker, and I think it's actually even more important
14 after Booker. If you are going, for example, to have
15 meaningful opportunities for the Government to appeal.
16 If a district court can impose a sentence that the court
17 of appeals then finds substantively unreasonable, and on
18 remand the district court can then consider grounds that
19 didn't exist at the time of the original sentencing,
20 and, in fact, couldn't have been considered by the court
21 of appeals because the evidence didn't exist at the time
22 the court of appeals reviewed it. And in this case it's
23 uniquely in the hands of the defendant to create, then
24 you are going to create essentially a procedural
25 merry-go-round where a district court will impose a 24

1 month sentence, the Government will appeal, the court of
2 appeals will think that is substantively unreasonable,
3 it will be remanded to the district court and they will
4 say, well, in the interim this person has rehabilitated
5 them self, they have gotten a job and they've gone to
6 school. The Government, and I'm imposing another 24
7 month sentence. These are not related to the facts of
8 the case, but this is a different hypothetical. The
9 Government will then appeal again and say this is
10 ridiculous. The underlying conduct is extremely severe,
11 24 months is substantively unreasonable and they will
12 appeal to the court of appeals. The court of appeals
13 will say we agree it's substantively unreasonable and we
14 will get a remand for resentencing. And the district
15 court will say, well, not only has he gone to school and
16 not only does he have a job, but he's gotten married and
17 he has been promoted and he has been named employ of the
18 year, so I am imposing a 24 month sentence again. And
19 at some point the Government is going to say, I give up,
20 because I could keep appealing, but what's the point, it
21 appears --

22 JUSTICE KENNEDY: But there are two
23 explanations for your hypothetical. One is there has
24 been a real change that affects the judge.

25 The other is where you began, I thought you

1 were going, where the judge is evading the court of
2 appeals. Those are two different things. One may
3 happen, one may not.

4 MR. CIONGOLI: That's right,
5 Justice Kennedy, and I think that both purposes are
6 served by 3742(g). 3742(g) as both the Petitioner and
7 the Government serves a constitutional purpose. What
8 both the Petitioner and the Government object to is the
9 way that it's drafted. It's not that Congress, they
10 say, couldn't pass this, but that they couldn't pass it
11 the way that it is passed because it makes essentially
12 illegal references to the mandatory sentencing
13 guidelines. That is a product of the fact that this
14 statute was drafted before Booker and didn't have the
15 benefit of knowing how Booker was going to come out.
16 What the Court I think needs to decide is post Booker
17 how it's going to deal with statutes like 3742(g), and
18 there are others, which stand for an entirely
19 constitutional and important purpose, but which
20 necessarily, because of the time they were drafted, have
21 references to or language that assumes the existence of
22 a mandatory guidelines scheme.

23 JUSTICE SOTOMAYOR: How many of those
24 statutes are left that the Court hasn't looked at?

25 MR. CIONGOLI: Well, I can think of at least

1 three problems that would result from the Court saying
2 that any reference to a mandatory guidelines scheme
3 creates -- creates essentially a facial invalidity if
4 it's incapable of constitutional review.

5 JUSTICE SOTOMAYOR: Which are the three?

6 MR. CIONGOLI: Well, first of all, 3553(a)
7 makes two references to 3742(g). So there's a question
8 as how you would apply those if you strike 3742(g). I
9 think that 3553(c), to the extent that it requires a
10 written statement in the context of a departure, starts
11 to raise questions. And as Justice Scalia points out in
12 his dissent in Booker itself, there is a real question
13 as to whether 3742(f) has any reason to exist after
14 Booker.

15 JUSTICE BREYER: But all those, what you
16 tend to do is take the parts that refer to the other
17 statute and say they don't do anything. And does that
18 ruin the provision its in, the answer I think normally
19 is no, it doesn't ruin it at all. It makes sense. But
20 this one is a tough one. I grant you that this one is a
21 tough one. And my problem of course is I can think of a
22 constitutional way of applying this, but it's a little
23 far-fetched and the far-fetched one makes me think that
24 it's unconstitutional in the far-fetched nature of it
25 and I don't think it has a spillover. The far-fetched

1 one was the one that was brought out. Not far-fetched,
2 but to say in those circumstances that it is
3 constitutional, where they are going to apply a new
4 guideline and they don't have the evidence. As much as
5 I dissented in Apprendi, I think that one probably does
6 violate Apprendi. And I think I have to stick up for
7 that, don't I?

8 MR. CIONGOLI: Justice Breyer, if you are
9 referring to the solicitor general's hypothetical of a
10 case in which they miscalculate the guidelines and they
11 don't announce their reasons otherwise, I actually think
12 there is a way to avoid the problem depending on whether
13 the point arises before or after this case. If it
14 arises after this case, I think it will be very clear to
15 the district court's that they need to be careful and
16 thorough in articulating their reasons for reaching the
17 sentence, which particularly in a post Booker world, I
18 think, is a good thing.

19 JUSTICE SOTOMAYOR: Would that -- I mean --
20 we right now are receiving hundreds of petitions saying
21 the court didn't sufficiently articulate its reasons.
22 We're going to change the practice of the district
23 court. I mean, dramatically. You think that's a good
24 thing to do?

25 MR. CIONGOLI: I think having a district

1 court articulate it's reasons is a good thing. They are
2 supposed to do that under Congressional statute now,
3 3553(c), they are supposed to do that in open court very
4 clearly and in certain circumstances they are supposed
5 to do it -- they are supposed to do it in writing.

6 JUSTICE BREYER: They can check a box, they
7 can check a box and unless they are going to depart.
8 Now, the parts that's not necessarily to deal with
9 later, the part that's confusing me is where this word
10 variance comes into. Because I think the word departure
11 would normally, normally cover the matter. And then
12 when it gets to the court of appeals, the court of
13 appeals, whether they are inside the guideline or
14 outside the guideline and have departed, reviews the
15 matter for, you know, inside it had departed or outside,
16 those situations. It says in Booker the standard is to
17 review for reasonableness. But where does this variance
18 business come in?

19 MR. CIONGOLI: I think in the context of
20 3742(g) that's one of the linguistic vestiges of the
21 guidelines, which is that up until Irizarry the Court
22 itself used the terms variance and departure
23 interchangeably because a variance didn't exist prior to
24 Booker. The Court obviously spoke to the question of
25 whether or not it was going to equate a variance and a

1 departure in the context of rule 32(h) in Irizarry. I
2 don't think actually that that distinction was essential
3 to the holding in Irizarry and I think could be limited
4 there. I think particularly where the court is trying
5 to avoid invalidating a duly enacted statute, some
6 flexibility in terms of interpreting departure in
7 3742(g)(2)(B) would be warranted and you would
8 essentially say that to the extent that a court is
9 varying or departing, that they would need to articulate
10 the reasons.

11 JUSTICE GINSBURG: It's true then that in
12 all of the briefings in Booker, 3742(g) was not
13 mentioned by anybody?

14 MR. CIONGOLI: That's correct, Justice
15 Ginsburg.

16 JUSTICE GINSBURG: So it was a question of
17 the Court overlooking it. The Court didn't say anything
18 one way or the other about it because it wasn't
19 presented as one of the statutes that would have to be
20 overruled?

21 MR. CIONGOLI: Justice Ginsburg, I think
22 that obviously the Court is dealing very clearly with
23 the constitutionality of it now. And I think that
24 Congress had very good reasons for enacting it that
25 continue to be valid. It's capable of constitutional

1 application, I think in the mine run of cases, and in
2 particular in this case. There is no Sixth Amendment
3 allegation in this case.

4 JUSTICE BREYER: The problem, to be very
5 specific, is I think the following: The first
6 sentencing, the judge applies the guideline. He says
7 there was \$300,000 stolen from the bank, I look it up
8 over here and I get sentence X. On appeal the appellate
9 court says you should have counted the securities as
10 money taken. So it's 1,300,000. So go and apply
11 guideline Y. He goes back and looks at Y, it's a very
12 high number, and thinks given certain circumstances
13 which make this case unusual, I want to depart downward.

14 Now, I would have thought that the judge's
15 behavior in that second instance would have violated
16 Apprendi, because that judge was either going to
17 sentence even without the departure on the basis of him
18 having taken some securities worth a million dollars
19 which was not a fact that went to the jury. There it
20 is. Or he has to throw aside the guideline.

21 But this statute says you can't throw aside
22 the guidelines, and you can't depart for a reason that
23 wasn't previously given. So this statute is -- is
24 forcing him to sentence on the basis of a fact that was
25 not found by a jury. I think that's the argument for

1 saying it violates Appendi. And I -- I don't see why
2 it doesn't.

3 MR. CIONGOLI: Justice Breyer, I -- I think
4 that in -- in certain applications of this statute there
5 will be problems. I -- I think that's unavoidable and I
6 think it's an unavoidable consequence of having been
7 drafted before Booker. The question is how the court is
8 going to address that. Is the court going to read the
9 statute flexibly? Is -- is it going to interpret it in
10 a way that tries to avoid those circumstances, those
11 constitutional problems? Or does it ultimately
12 determine that it is -- it is essentially not capable of
13 a saving construction.

14 I think it is capable of a saving
15 construction; I think it is capable of a saving
16 construction in a couple of ways that avoid most of the
17 problems that have been articulated by -- by both
18 Petitioner and government. The first, which actually
19 Petitioner points out in his reply brief, is in 3742(g)
20 itself, there is this language about "except that," that
21 appears to limit the -- the ability of the district
22 court to actually follow the mandate of the court of
23 appeals.

24 I don't think that that can be read to limit
25 the mandate in the court of appeals, nor do I think that

1 anyone is suggesting that 3742(g) changes the rule in
2 Harper v. Virginia Department of -- of Taxation, the
3 idea that -- that district courts obviously would have
4 to give the benefit of intervening changes in -- in law
5 in judicial decisions; and so Booker which has been used
6 as an example, Booker on remand would likely have been
7 entitled to a -- a resentencing, a resentencing based on
8 factors that the district court judge could have
9 considered at the time of the original sentencing, but
10 now in light of Booker, basically a do-over. And for a
11 -- for a small section of cases, I think that would
12 work.

13 JUSTICE SCALIA: How? Would -- would you
14 explain as concisely as you can, why you think that
15 (g)(2) would be unconstitutional in -- in some limited
16 category of cases, and how that can be avoided by what
17 you call a flexible interpretation?

18 MR. CIONGOLI: Justice Scalia I think I said
19 it would be problematic; I don't think I conceded that
20 it would be unconstitutional.

21 JUSTICE SCALIA: All right.

22 MR. CIONGOLI: I think that -- I think that
23 there are -- there are some circumstances where, by a
24 strict read of -- of (g)(2), the court would be required
25 to apply the guidelines, a guidelines range. And the

1 example that -- that the Solicitor General's office gave
2 might be the best, which is where you have a
3 circumstance where the district court has imposed a
4 sentence within the guidelines range, has not given any
5 other reason for a variance, the sentence is at the
6 bottom of the range which may or may not indicate that
7 they thought that the -- that the sentence should be at
8 the low end; and then on a -- on a calculation there is
9 a determination that the -- on appeal there is a
10 determination that the calculation was incorrect; and on
11 remand the district court says, I'm -- I'm bound by this
12 new calculation, and I'm giving you a mandatory
13 sentence.

14 I'm giving you -- I'm bound by the
15 guidelines range because I didn't give any other
16 reasons. I didn't give any other reasons under -- under
17 (2)(A), and therefore I can only give you a guidelines
18 sentence. And in those cases the guidelines would be
19 mandatory. And under Booker I think there is -- there
20 is a question as to whether a court can impose a
21 mandatory sentence in any case after Booker.

22 JUSTICE SCALIA: Well, but -- I mean, why
23 wouldn't you read that simply to have been overcome by
24 the holding of Booker, that you apply -- that every
25 judge has to apply 3553 factors and decide the ultimate

1 sentence on the basis of those factors? I mean, isn't
2 that what Booker said, and why wouldn't you apply that
3 to -- to (2)(A) and (B) as well?

4 MR. CIONGOLI: I -- I -- I certainly think
5 the Court could take that approach, and -- and in fact I
6 think to -- I think to -- I think it should. I think
7 that the Court should find a way to read or construe
8 3742(a) to be constitutional, because it serves an
9 important and independent policy choice that has been
10 identified by Congress.

11 JUSTICE GINSBURG: But doesn't it conflict
12 with 3553(a)(2), that is, the overriding provision that
13 a sentence should be sufficient but not greater than
14 necessary to deter criminal conduct. And the judge is
15 looking at this defendant and says -- a criminal -- to
16 deter criminal conduct and protect public against future
17 crimes: "Well, this person has turned out to be a model
18 citizen, and we don't have to keep him in for a longer
19 time to protect the public against future crimes. So if
20 I were to apply 3742(g)(2), I would give him a sentence
21 that is unnecessary to protect the public against future
22 crimes."

23 MR. CIONGOLI: Justice Ginsburg, I think you
24 are pointing out that there is some tension which I have
25 admitted. I think that again, this statute was drafted

1 at a time when there was a different set of assumptions,
2 and so there may -- there may be applications which
3 create some difficulty.

4 They create more difficulty in terms of how
5 it is applied, but they are not the kinds of
6 difficulties that I think are insurmountable. And they
7 are certainly not the kinds of difficulties that support
8 what I think is -- is a proposed broad solution by both
9 the Petitioner and the government, that post Booker,
10 sentencing statutes which -- which impose a mandatory
11 guideline sentence really in any applications are
12 facially unconstitutional.

13 I -- I don't read Booker that way, I don't
14 think the Court intended it that way. Certainly the
15 remedial holding in Booker doesn't indicate that. If it
16 did -- if that is in fact what the remedial holding in
17 Booker stands for, I think the -- the implications are
18 more far reaching than the Court -- the Court intended.
19 If there are no further questions?

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 Mr. Parish, you have 2 minutes remaining.

22 REBUTTAL ARGUMENT OF ALFREDO PARRISH

23 ON BEHALF OF THE PETITIONER

24 MR. PARRISH: Thank you. I would like to
25 first address the law of the case issue. Initially I

1 said it was apples and oranges, and it is. On two
2 separate occasions after the 5 K ruling had been made by
3 District Court Judge Bennett, it was appealed twice to
4 the Eighth Circuit. After it was appealed twice to the
5 Eighth Circuit, they had an abuse of discretion standard
6 they could have used to resolve it. They did not
7 comment on it. They upheld it.

8 Then it was sent back down. After it had
9 come up on an original writ to this Court, this Court
10 vacated the Eighth Circuit opinion, sent that opinion
11 back down. But the law of the case, as you said, Mr.
12 Chief Justice Roberts, still remained with the district
13 court on the initial ruling. The initial ruling that
14 Judge Bennett made with regard to the 5K departure was a
15 separate ruling.

16 Now the Eighth Circuit in its own analysis
17 of how you interpret its remand, we disagree with the
18 government. They said they -- you look at the analysis
19 of the case to determine the remand. And in that
20 instance, we believe that the remand was the analysis of
21 the case that the 5K departure remains. No new facts
22 came in, no new controlling law came into place, and
23 there was no manifest in justice. She heard no new
24 facts on this case.

25 We believe the Court should reverse --

1 vacate the Eighth Circuit Court of opinion case
2 regarding post-sentencing rehabilitation, remand with
3 direction from this Court consistent with an opinion
4 that requires the court to impose a sentence that does
5 not exceed 24 months.

6 And, Justice Ginsburg, we did mention on
7 page 33 of our brief, the 3742(g)(2) as a footnote, when
8 the case first came up. But the Eighth Circuit, as you
9 all know, did not use that rule. They used an old rule
10 that was in effect from the Sims case to impose the
11 sentence. It was not part of 3742(g)(2) or any other
12 statute.

13 Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel.

15 Mr. Ciongoli, you have briefed and argued
16 this case as amicus curiae in support of the judgment
17 below at the invitation of the court and have ably
18 discharged your responsibility.

19 The case is submitted.

20 (Whereupon, at 12:04 p.m., the case in the
21 above-entitled matter was submitted.)

22

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24

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